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In The

Supreme Court of the United States

October Term, 1994

JED K. DETERS,

Petitioner,

vs.

JUDICIAL RETIREMENT AND REMOVAL COMMISSION OF THE COMMONWEALTH OF KENTUCKY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Like most states, Kentucky selects its judges by popular vote rather than by executive appointment. During elections Kentucky Supreme Court Rule 4.300, Canon 7B(1)(c) prohibits judicial candidates from discussing or debating certain political issues with the electorate. The determination of what topics can or cannot be discussed is made by a state body, the Judicial Retirement and Removal Commission. In November 1991 Petitioner Jed K. Deters was a candidate for district court judge. The Kentucky Supreme Court found the First Amendment inapplicable to certain political advertisements Mr. Deters made on topics the Commission determined to be forbidden. The court also affirmed sanctions imposed upon Mr. Deters for having spoken on these topics. The question presented is:

> Whether content-based prohibitions of campaign speech which would otherwise be unconstitutional under this Court's First and Fourteenth Amendment decisions were properly imposed upon a candidate running for judicial office in a popular election.

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PETITION FOR A WRIT OF CERTIORARI

Jed K. Deters respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the Commonwealth of Kentucky in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (Appendix A, *infra,* pp.1a-15a) is reported at 873 S.W. 2d 200. The opinion of the Judicial Retirement and Removal Commission (Appendix B, *infra,* pp.16a-21a) is unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky issued its opinion in this case on March 24, 1994. Judgement became final on April 15, 1994.[1] The jurisdiction of this Court is invoked under 28 U.S.C § 1257.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

At issue in this case are the First Amendment of the United States Constitution; the Fourteenth Amendment, § 1 of the United States Constitution; Kentucky Supreme Court Rule 4.020 and Kentucky Supreme Court Rule 4.300, Canon 7B(1)(c). These are reprinted in Appendix C, *infra*, pp. 17a-40a.

STATEMENT OF THE CASE

This case involves the validity of content-based speech restrictions in the context of the popular election of judges.

A. The Parties

Petitioner Jed K. Deters was a candidate for a seat on the District Court bench in Kenton County, Kentucky in 1991.[2] In the course of the campaign, Mr. Deters published two political

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1. Final Judgement is entered by the clerk, rather than by a separate written judgment issued by the Kentucky Supreme Court. Kentucky Rules of Civil Procedure, Rule 76.30. The Appendix filed with this Petition therefore contains no written Order of Judgement. The date of Final Judgment can be verified with the Clerk of the Kentucky Supreme Court, 502-564-4178.

2. The Kentucky Court system is divided into two trial courts, an intermediate level Court of Appeals, and the appellate court of last resort, the Supreme Court. Ky. Const. §§ 110 -113. Of the trial courts, the Circuit Court has general original jurisdiction, and the District Court has limited original jurisdiction, primarily over probate,juvenile, and minor criminal and civil matters. Ky. Const. §§ 112, 113; KRS § 23A.010, *et seq*; KRS § 24A.010, *et seq*.

advertisements in local papers and was sanctioned by the Respondent, which determined that these advertisements were on forbidden political topics and therefore illegal.

Respondent, The Judicial Retirement and Removal Commission (the "Commission"), is a state body responsible for enforcing the State Code of Judicial Conduct. Ky. Const. § 121; KRS § 34A.345; SCR 4.300.[3] The Commission is comprised of six appointed members: one judge each from the Court of Appeals, Circuit Court, and District Court, a member of the bar, and two members of the public. *Id.* Because all of Kentucky's judges and justices are selected through popular election rather than appointment, the Supreme Court also delegates to the Commission power to enforce election prohibitions during judicial campaigns. The Commission used one of these election rules, Supreme Court Rule 4.300, Canon 7B(1)(c), to sanction Petitioner for his campaign advertisements.[4]

B. Canon 7B(1)(c)

As written, Canon 7B(1)(c) imposes upon a judicial candidate

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3. The Kentucky Supreme Court regulates the bench through the Code of Judicial Conduct, which is taken from the American Bar Association's Model Code of Judicial Conduct. SCR 4.300.

4. Kentucky is one of 35 states to use popular election for judges on one or more judicial levels. State Court Organization 1987, National Center for State Courts, ed. 1988. Currently, the Kentucky Supreme Court endeavors to replace popular election with the so-called "Missouri Plan," a merit-based system of appointment supported by the American Bar Association to replace popular election of judges. *See* Winters, *Judicial Selection and Tenure,* in Judicial Selection and Tenure: Selected Readings (G. Winters. ed. 1973). The General Assembly has thus far refused to replace public election with the Missouri plan. It is still the Kentucky electorate's substantive policy choice, embodied in the state Constitution, to retain popular election as the means of holding the judiciary accountable. *See* remarks of Mr. Chief Justice Stephens in *The Kentucky Post,* § A, p. 2, col. 7 (July 4, 1994).

a content-based prohibition on speech related to certain issues:

> [A candidate] should not make pledges or promises of conduct in office other than the faithful and impartial performance of duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent his identity, qualifications, present position, or other facts.

The Commission investigates statements made by candidates, evaluates their content, and imposes sanctions when it determines that the content of the candidate's speech is forbidden. SCR 4.000, *et seq.* Sanctions include private and public censure, suspension or removal from office, or disbarment from the practice of law. SCR 4.020.

However, this view inevitably conflicts with two countervailing principles. First, it is irreconcilable in those states where citizens continue to use judicial elections as the preferred means of holding the judiciary accountable, and thus need full access to judicial information to make intelligent choices. Sheldon & Lovrick, *Knowledge and Judicial Voting: The Oregon and Washington Experience,* 67 Judicature 234 (Nov. 1983). Second, it conflicts with a candidate's parallel First Amendment right to inform the electorate of his views, and otherwise tirelessly advocate for his own election. *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) ("[I]t is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates . . . before choosing among them."

In the last three years this irreconcilable tension has come to a head.

Prior to 1991 the ABA was more direct in prohibiting all political speech by a judicial candidate, stating in Canon 7B(1)(c) that a candidate for judicial office:

> [S]hould not make pledges or promises of conduct in office other than the faithful and partial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

SCR 4.300, 7B(1)(c) (ed.1990). However, the federal and state courts reviewing this Canon unanimously held it to be overbroad and thus in violation of the First Amendment. *See Buckley v. Illinois Judicial Inquiry Board,* 801 F. Supp.83 (N.D. Ill. 1992), *rev'd on other grounds* in *Buckley v. Illinois Judicial Inquiry Board,* 997 F.2d 224 (7th Cir. 1993) (District Court was without power to redraft overbroad statute to cure unconstitutionality); *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania,* 994 F.2d 137 (3rd Cir. 1991) (Canon is constitutional only when narrowly construed); *American Civil Liberties Union v. The Florida Bar,* 744 F. Supp. 1094 (N.D. Fla.1990); *Beshear v. Butt,* 773 F. Supp. 1229 (E.D. Ark.1991); *J.C.J.D. v. R.J.C.R., Ky.*, 803 S.W. 2d 953 (1991).

The decision of the Kentucky Supreme Court in *J.C.J.D.* is illustrative. In that case, while campaigning for a seat on the Kentucky Supreme Court, then-Judge Combs publicly criticized the court regarding its resolution of particular legal issues. The Commission charged that his advertisements on these issues were *per se* violations of the Canon and ordered him suspended from the bench without pay for three months. In defense Judge Combs asserted that he enjoyed First Amendment Rights to speak on these issues and that the Canon was overbroad. The seven appointed justices of the Kentucky Supreme Court (the elected Justices

recused themselves because of the conflict of interest) found that while the state had a compelling interest in protecting the integrity of the judiciary, such interest did not justify a prophylactic content-based prohibition on speech. The court also found that the rights of the electorate were paramount, and the candidate's concomitant right to inform the electorate of his views a compelling one. 803 S.W. 2d at 956. Furthermore, the court held that "We further believe candidates for judicial office can announce their views on legal and political issues without jeopardizing the integrity and independence of the legal system or undermining the impartiality of the judiciary." *Id.*

At approximately the same time, the ABA reached the same conclusion regarding the Canon's doubtful constitutionality. It thereupon re-drafted the Canon, substituting the phrase of the present Canon, *i.e.*, "make statements that commit or appear to commit the candidate on cases, controversies or issues likely to come before the court" for the previous phrase "announce his views on disputed legal or political issues." Milord, *The Development of the ABA Judicial Code*, p. 50 (ed. 1991). The remainder of the Canon remained unchanged. The ABA did not, however, abandon its content-based approach to regulation of judicial campaigning, nor did it define the key terms "appear to commit," "cases or controversies," or "issues likely to come before the court."[5]

In addition to the Kentucky Supreme Court in the case *sub judice*, two federal courts have faced the language of the present Canon. In *Ackerson v. Judicial Retirement and Removal Commission*, 776 F. Supp. 309 (W.D. Ky. 1991), the court found the revised language overbroad, concluding that the statute could

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5. After the seven special Justices declared the Canon unconstitutional in *J.C.J.D.* the elected Kentucky Supreme Court adopted the revised ABA Canon 7B(1)(c) in April 1991.

not reach speech devoted to administrative issues, speech on issues unlikely to come before the court, or speech on issues likely to come before the court so long as the candidate did not make direct or indirect commitments on these issues. The court limited the Canon's prohibition to speech committing the candidatre on issues likely to come before the court. It did not, however, define "likely," or what was a "direct or indirect commitment." It also held that the unavoidable chilling of speech rights arising from the imprecision of the term "likely to come before the court" was permissible when balanced against the state's interest in regulating the judiciary.

In *Buckley,* 801 F. Supp. 83, the District Court found the previous Canon 7B(1)(c) to be unconstitutionally overbroad, but upheld it by replacing the "announce" clause with the "likely" language found in the present Canon. The Seventh Circuit reversed, finding that the District Court was without power to re-draft the Canon. 997 F.2d 229-230. Furthermore, in dicta the Seventh Circuit observed that the "likely" standard, because it did not significantly circumscribe the offending language of the previous "announce" clause, was itself also unconstitutional. Because virtually any legal or political issue is likely to come before an American court at some point, the Seventh Circuit observed that the "likely" standard could not serve as a constitutional yardmarker. *Id.* at 229.

The threshold question presented here is whether the state's continued use of this content-based approach to regulation of judicial campaigns is constitutionally licit, and if so, whether the redrafted Canon, on its face or as applied, survives strict scrutiny.

C. The Proceedings Below

The facts of this case are relatively straightforward and not in dispute.

In November, 1991 Mr. Deters was one of seven candidates running for the remainder of a vacant seat on the District Court bench. Mr. Deters actively campaigned, taking advantage of the full panoply of campaign options, including door-to-door canvassing, meet-the-candidate fora, bar association events, telephone solicitation, advertising and direct mailing. During his campaign, voters consistently inquired into Mr. Deters' views on various issues, including the "pro-life/pro-choice" issue. (R.4, Tr. pp. 9-10). In response to these inquiries Mr. Deters published two political advertisements in the local newspapers which, inter alia, included the statement "Jed Deters is a Pro-life candidate." *Id.* Mr. Deters did not win a seat on the bench and returned to the practice of law.

Shortly thereafter, the Commission charged that these advertisements violated Canon 7B(1)(c)'s prohibition on political speech. Specifically, the Commission charged that these advertisements: (1) were on a political issue (abortion), which (2) was likely to come before the court, and (3) which appeared to commit him in regard to these issues. (App. B, p. 19a). Mr. Deters refused to accept the sanction on the grounds that his political advertisements were protected First Amendment speech, and that since this was not an issue likely to come before the court the Canon did not apply. The Commission instituted formal charges, and held a full hearing on the record on September 23, 1992.

At the hearing, the Commission presented no evidence other than the two advertisements. Mr. Deters specifically asserted his First Amendment challenges at issue in this Petition. (App. B, 20a). He also testified and presented evidence that pro-life/pro-choice was not "likely" to come before the court: there were no hospitals or clinics performing abortions in Kenton County, there was easy access to abortions in nearby Ohio, and the sitting judges had never heard an abortion-related case in ten years and did not

have any on their dockets. (R.4, Tr. pp. 23, 46-47, 59-60).[6] Mr. Deters also stated on the record that his personal beliefs would not compromise his ability to be impartial. *(Id.,* Tr. p. 22).

The Commission disagreed. Reading the terms of the Canon broadly, the Commission held that abortion was likely to come before the district court, that the advertisements declared his position on the abortion issue, and left no doubt in the public's mind that he could not be fair and impartial on the issue. (App. B, pp.19-20a). Although counsel for the Commission produced no evidence other than the advertisements, the Commission held that these allegations were proved by clear and convincing evidence. Regarding Mr. Deters' facial and applied constitutional challenges to the Canon, the Commission found that it was without jurisdiction to decide First Amendment issues. (App. B, p. 20a). Mr. Deters timely appealed.

In a 5-2 decision, a majority of the Kentucky Supreme Court affirmed the Commission's broad reading in every respect. The majority opinion affirmed that the term "likely to come before the court" was to be broadly construed, and in this case could include not only abortion, but any other issue related to "pro-life." It also affirmed the broad reading given the term "appear to commit the

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6. The commission also interposed various possibilities how abortion *might* come before a district court. The abortion issue could possibly arise under Kentucky's parental consent law, KRS 311.732 whereby a minor can petition a district court in the event she cannot secure required parental consent for abortion. However, at the time of the hearing these parental consent provisions were unconstitutional, obviating the need to petition the court for a legal abortion. ***Eubanks v. Wilkinson,*** 937 F.2d 1118 (6th Cir. 1991). Another commissioner opined that abortion may possibly arise were Mr. Deters asked to serve as a special judge in other counties, where abortion-related cases might arise. Mr. Deters answered that he was not eligible for such special assignments. Ky. Const. § 122 (eligibility requirements for sitting judges). (R.4, Tr. pp. 52-54).

candidate," construing it to include virtually any public statement made by the candidate. The majority also concluded that the allegations had been proved by clear and convincing evidence, notwithstanding that the Commission had introduced no factual evidence into the record.

Similarly, the majority resolved all First Amendment issues against Mr. Deters. Citing *Ackerson,* 776 F. Supp. 309 and distinguishing *Buckley,* 997 F.2d 224 and *J.C.J.D.,* 803 S.W. 2d. 953, the court held that the terms "likely to come before the court" and "appear to commit the candidate" were not overbroad. *Buckley* was distinguished on the grounds that its discussion on the constitutionality of the "likely" standard was mere dicta. The court distinguished *J.C.J.D.* by holding that since that decision concerned the previous Canon, none of its holdings applied. The majority acknowledged, but did not distinguish or evaluate, the decisions where this Court struck down similar content-based restrictions on election speech. *Monitor Patriot Company v. Roy,* 401 U.S. 265 (1971); *Buckley v. Valeo,* 424 U.S. 1 (1976); and *Brown v. Hartlage,* 456 U.S. 45 (1982). Rather, the Commission could aggressively prohibit campaign speech because the state had a compelling interest in "protecting the fundamental fairness and impartiality of the legal system." The advertisements were therefore not entitled to First Amendment protection because they "tend to undermine" fundamental fairness and impartiality. In short, the majority appeared to overrule *J.C.J.D.* and reinstate a broad prophylactic ban on campaign speech.

In dissent, Justice Wintersheimer pointed out that the majority was not faithfully following established principles of election speech jurisprudence. By focusing exclusively on the speaker and on content, the majority was failing to account for the rights of the voters to engage in political dialogue with the candidate. According to Justice Wintersheimer the proper starting point is the fundamental right of the electorate to know a candidate's views,

and to obtain the information which is relevant to their decision-making. This right should have been paramount, citing *Monitor Patriot Co.*, 401 U.S. 265. Under this principle, the voters, and not the state, have the right to decide what is important and relevant. The Commission could not therefore act to prohibit dissemination of otherwise relevant information.

Justice Wintersheimer also observed that the majority's opinion failed to apply the correct standard of review required under this Court's First Amendment jurisprudence. Citing *Hartlage*, 456 U.S 45, and *In re Primus*, 436 U.S. 412 (1978), Justice Wintersheimer observed that on appellate review this Court requires the most exacting scrutiny of content-based restrictions which impose sanctions upon the speaker. Because such content-based prohibitions are presumptively unconstitutional, this Court requires the state to demonstrate not only a compelling state interest, but that the prohibition is necessary to further that interest, is the most narrowly tailored means available, and is strictly applied. The majority was in error for failing to strictly evaluate all the elements of the Canon under this correct standard.

Justice Wintersheimer agreed with the majority that the state had a compelling interest in protecting the integrity of the judiciary. However, the other requisite elements — necessity, precision and strict application — had not been demonstrated by the state. Recusal was the most appropriate and narrowly tailored means of furthering that interest. A content-based prohibition on speech was neither necessary, narrowly tailored, nor fully capable of honoring protected speech. Nor, in this case, was the majority strictly applying the Canon. The only effect of the majority's broad reading was to create an intolerable burden on the candidate and the voters' First Amendment rights.

REASONS FOR GRANTING THE WRIT

From this Court's decisions arises a uniform and strong hostility towards government activity regulating, scrutinizing, burdening, or imposing sanctions upon the content or viewpoint of election speech. Because voters require full ventilation of ideas and viewpoints if they are to make meaningful political choices, this Court instructs that a government is well-considered to leave hands-off of election speech. In the marketplace of ideas, the candidates, not the government, stock the shelves.

The regulation contemplated by Canon 7B(1)(c) violates this principle in a particularly aggressive manner. It is content-based, chills expression of certain subjects and viewpoints, emphasizes detailed state scrutiny of speech, and imposes severe sanctions for content violations. It replaces the "marketplace of ideas" with a state-imposed system determining importance and relevancy.

The Kentucky Supreme Court's approval of this system of regulation, in face of otherwise settled precedent, creates an important exception to First Amendment jurisprudence. However, such an exception does not withstand strict scrutiny and the court below was in error for sanctioning this exception.

The creation of this exception, and the concomitant narrowing of voters' political rights, is an important and far-reaching issue warranting immediate review on certiorari.

I.

THE KENTUCKY SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS IN THE ELECTION SPEECH AREA.

A. Content-Based Restrictions of Election Speech Are Unconstitutional.

Just two terms ago, in a unanimous opinion, this Court affirmed the "obvious" First Amendment principal that "regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster, Inc. v. Members of the New York Crime Victims Board,* 112 S. Ct. 501, 508 (1992). A government's ability to impose content based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace, and that this sort of discrimination is beyond the power of government. *Id.* Furthermore, because the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office, this Court has repeatedly struck down content-based restrictions on campaign speech. *Mills v. Alabama,* 384 U.S. 214 (1966); *Monitor Patriot Company v. Roy,* 401 U.S. 265 (1971); *Brown v. Hartlage,* 456 U.S. 61 (1982).

On its face there is nothing putting the ABA's system of content-regulation beyond an otherwise straightforward application of this "obvious" principle. The Canon is a direct manifestation of the ABA's hostility towards political speech by judges in general and by candidates in particular. Though the ABA redrafted the Canon into an ostensibly more narrow one, its essential and most constitutionally repugnant features were left intact. The Canon maintains its content-based approach, its extensive evaluation of speech by a state body, its vesting of broad powers of discretion in the state, and the evisceration of political

dialogue between the candidate and electorate. Furthermore, its overbreadth problems were not cured, insofar as its imprecise terms are susceptible to extraordinarily broad interpretations, both prospectively and retrospectively. The Canon thus shares the same constitutional infirmity that this Court has attached to similar ABA Canons prohibiting commercial speech by attorneys. More importantly, it shares the same constitutional infirmity with the speech restrictions struck down by *Mills* and its progeny. Its particularly aggressive content-based approach makes this an "open-and-shut" case when viewed against this Court's constitutional landscape.

B. The State Did Not Demonstrate a Need for an Exception to This Court's Prohibition on Content-Based Restrictions.

At its most basic, the Kentucky Supreme Court abdicated its responsibility as an appellate court reviewing First Amendment issues. While the court had no problem finding a compelling interest in protecting the integrity of the judiciary, citing *Morial v. Judiciary Commission,* 565 F.2d 295, 305 (5th Cir. 1978), as Justice Wintersheimer correctly pointed out in dissent, such compelling interest is not enough. The court below was required to exercise exacting scrutiny of the state's asserted justification, and uphold the Rule only if all elements — need, precision and application — were met. By stopping at the compelling interest, and failing to reach the other requirements of strict scrutiny, the court was not being faithful to its responsibility. Had it properly evaluated the Canon, and required the state rather than the candidate to demonstrate its necessity and precision, it would not have survived.[7]

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7. This Court has left open the question whether anything less than protection of another constitutional right can be a compelling state interest justifying content-based restrictions on speech. *Burson v. Freeman*, 112 S. Ct. 1846, 1858 (1992) (Kennedy, J., concurring). Assuming, however, that such an interest may be compelling, it should still be subjected to strict scrutiny. *Id.*

1. A Rule Prohibiting Candidate Speech Is Not Necessary to Further the Compelling Interests of the State.

It is a virtual tautology that the state has a compelling interest in protecting the integrity of the judiciary. It has long been political mantra that such an interest justifies strict prohibitions on campaign speech. However, legal literature has increasingly criticized this view as being historically, and philosophically, suspect. *See, e.g.,* Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office,* 35 UCLA L. Rev. 207 (1987). Simply put, there is no necessary connection between political speech and the public's perception of the judiciary. S. Nagel, *Comparing Elected and Appointed Judicial Systems* 36-37 (1973). Indeed, restrictions on speech may even be counterproductive in fostering respect for the judiciary. Sheldon & Lovrich, *supra* at 240-241.

A similar problem with this view is that a restriction on candidate speech is that it is seriously underinclusive. Judges, and candidates, announce their views on issues through numerous channels: rulings and opinions from the bench, extra-judicial scholarship and teaching, participation in advocacy and law-reform efforts, and through professional and social affiliations. This Court, in particular, has a long and venerated history of speaking out on disputed issues. Westin, *Out-of-court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw,* 62 Colum. L. Rev. 633 (1962). If the state interest is such that a content-based restriction is appropriate, then it is underinclusive if it does not reach the numerous other avenues wherein a judge or candidate can announce his views to the voting public, thereby "casting doubt" on his ability to be impartial.

Moreover, the view that content-based restrictions are justified during a campaign rests on a specious assumption that,

without restrictions, a judicial candidate will descend into pandering and dealmaking. However, this Court has long considered this assumption, that absent restraints members of a professional class cannot be trusted to behave professionally, to be a "dubious" one. *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). Its necessary corollary, the anti-democratic conclusion that if candidates were to go *mano-a-mano,* the electorate could not be trusted to separate the sacred from the profane, is also specious. The best antidote for speech being more speech, this court has soundly rejected this assumption as well. *Peel v. Attorney Registration and Disciplinary Commission,* 496 U.S. 91 (1990).

In the end, too, it ignores the simple fact that "judges are not fungible commodities." *Chandler v. The Judicial Council,* 398 U.S. 74 (1970) (Douglas, J., dissenting). A judge coming into a case is not a *tabula rasa* but is instead expected to have views on the important issues and philosophies of the day, bringing to the bench his insights, moral compass and fundamental respect for the law. When assessing impartiality, the critical inquiry is not whether the judge has personal views on the subject, but whether he can properly put aside his personal view and fairly apply the law to the facts of the case before him. What his views are, and where he acquired or announced them, is irrelevant to this inquiry. Focusing on content or the source of the views seriously detracts from the central inquiry. *Liteky v. United States,* __ U.S. __ (1994) (slip opinion, p. 2) (Kennedy, J., concurring).

In the case *sub judice* the state did not demonstrate how a content-based prohibition on campaign speech is necessary to further its interest. Even without the benefit of such a showing, however, strictly scrutinizing some of the possible justifications reveals that they are inadequate to support such an aggressive content-based system of regulation. While the ABA has long advocated such an approach, such has never been necessary. As Professor Snyder pointed out, the justification for such an

aggressive content-based approach is in reality a vote of no confidence in the First Amendment. Snyder, *supra* at 246.

2. *Canon 7B(1)(c) Is Not a Narrowly Tailored Means of Furthering the State Interest.*

Assuming, *arguendo,* a necessity for restrictions on campaign speech, that necessity still does not justify the exception created by the Kentucky court because Canon 7B(1)(c) is still substantially overbroad, both on its face and as applied.

While differing in rationale, the unified holding of each court facing the previous Canon 7B(1)(c) was that it was impermissibly broad. *Buckley,* 997 F.2d 224; *Stretton,* 994 F.2d 137; *ACLU,* 774 F. Supp. 1094; *Beshear,* 773 F. Supp. 1229; *J.C.J.D.,* 803 S.W. 2d 953. However, the ostensibly more narrow Canon presented by the ABA does not cure the overbreadth problems. As the Seventh Circuit noted in *Buckley, supra,* 997 F.2d 224, the terms "likely to come before the court" and "appear to commit the candidate" are notoriously open-ended terms, and leave considerable discretion in the hands of the enforcement body to prohibit a plethora of otherwise protected speech. "Likely" and "appear to commit" do not establish any meaningful standards for determining whether a particular topic falls within or without its reach. In certain respects, the new standard even exacerbates the chilling effect of the content-based approach. While the previous Canon was a blanket prohibition, the standard of the new Canon is fluid, and capable of differing interpretations. As Mr. Deters found out, prospective review of the Canon is to no avail because a state body is able to give it a wide, more prohibitory *ex post facto* effect. The fact that this standard is fluid, open ended, and can be used to reach otherwise protected speech, dooms it under this Court's teachings. *Simon & Shuster,* 112 S. Ct. at 508.

Another indication that this content-based prohibition is not

the most narrowly tailored means available is that recusal can fully protect the state's compelling interest without chilling or prohibiting the content of campaign speech. If a judge's views are such that he cannot be impartial, then the litigants —who are in the best position to assess bias to the facts or law of the case — can request or require recusal. The fact that recusal has ascertainable standards, appellate oversight and a well developed body of case precedent makes content-based prohibitions of speech a poor step-child. Given the existence of this more appropriate and narrowly tailored alternative, content-suppression cannot survive constitutional scrutiny.

C. The Kentucky Supreme Court 's Application of the Canon to the Facts Was Erroneous.

In the opinion below, the majority glossed over the otherwise overwhelming evidence in the record that as a factual matter, the "abortion" topic was beyond the Canon's reach. No hospitals or clinics perform abortions, no abortion case has arisen in the District Court's for a substantial time, none were pending, and the parental consent statutes were unconstitutional such that judicial intervention was not needed to protect a minor's right to an abortion. The majority's findings to the contrary are clear error.

For that reason, they should be reviewed by way of certiorari because these plainly erroneous findings were used to support a denial of First Amendment speech rights during an election. This Court has previously indicated that it will not abide a tribunal's factual error when the result of that error is to eviscerate a citizen's constitutional rights. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982); *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964). This policy should be even more applicable in this case, when the court below ruled not only on the facts of the instant case, but expressed approval for a broad exception to this Court's settled jurisprudence, an exception that has important ramifications beyond the parties to this petition.

Furthermore, these erroneous factual findings were the basis for doing away with otherwise required First Amendment procedures. Last term this Court reaffirmed that the First Amendment requires constitutionally adequate procedures before speech rights can be taken away. *Waters v. Churchill*, No. 92-1450, 62 USLW 4397, 4399 (1994). In ignoring the evidence to reach its programmatic result, the majority penalized protected speech without even requiring the state to meet its burden of proof, or even produce evidence for that matter. While the parameters of procedural protection under the First Amendment have not yet been fully explored by this Court, the *per se* approach taken here hardly approaches the minimum threshold. The majority's use of erroneous factual findings to do away with procedural protection should merit this Court's scrutiny as well.

II.

THE QUESTION OF WHETHER JUDICIAL ELECTIONS ALLOW THE STATES TO IMPOSE CONTENT-BASED RESTRICTIONS IS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

A. The Question Presents Issues That Are of Great Importance to the States, Candidates, and to the Political Process.

As noted above, this Court has a well-developed body of First Amendment election law. However, it has not yet applied its precedents to judicial elections. Whether the state interest in protecting the judiciary is sufficiently compelling, or the nature of judicial elections so different such that the general First Amendment principles admit of an exception, is an important question this Court has not yet, but should resolve. It is an issue whose importance stretches beyond the case *sub judice*. Thirty-

five states select one or more levels of judges through popular elections. Many, if not all, enforce these judicial prohibitions which are taken from, or modeled after, the ABA's Model Code. The interpretation by one state has a substantial ripple effect in sister jurisdictions, so one state's interpretation and approach has obvious importance for the political systems of these states, its voters and its candidates. In any event, whatever the correct resolution of the constitutional questions is, it should deserve this Court's utmost solicitude.

Moreover, while the issue has received sufficient percolation through the lower courts, the imprecise language of the Canon makes the opportunity for regular or further appellate review problematic. As the Seventh Circuit noted in *Buckley,* 997 F.2d at 229, the terms of the Canon are considerably imprecise, and have the potential of sweeping virtually any topic under their ambit. Such imprecision, and potential application, has the considered effect of chilling enormous amounts of otherwise protected speech. Faced with the possibility of severe sanctions candidates will simply self-censor. Because of such self-censorship, the Rule will receive only sporadic attention by appellate courts, making the opportunity of further review by this Court uncertain.This Court thus has a rare opportunity to address a question of fundamental constitutional importance to states, voters, and the political process. The facts are straightforward and the issues are squarely presented and this Court should thus take the opportunity to review this important issue.

B. Review of the Question Would Provide the Courts Below With Authoritative Guidance.

Although the self-censorship arising from the Canon makes appellate review problematic, this Court should still lend its authoritative voice to the issue. Evolving notions of the First Amendment now recognize the free speech rights of judges, which

as the appellate cases below show, are on a collision course with the state's interest in controlling such speech. This issue is now at the forefront, and will be played out in the various enforcement tribunals in the state. Similililarly, while every lower court has had difficulty with the Canon, none has yet successfully grappled with the threshold consideration, namely the content-based approach. Whether the Constitution requires abandonment of the content-based approach, or whether, if maintained, it must be limited, are important issues facing these tribunals, and this Court has an opportunity to provide much needed guidance in this area.

C. It Is Particularly Important for This Court to Exercise Oversight Over the State Courts.

This issue, more than most, is an issue needing federal oversight. These Canons are enacted, interpreted, and enforced by state court judges who themselves must go through the electoral process. It is a given that restrictions on speech favor incumbents: the best way to gain reelection is to stifle criticism; the best way to stifle criticism is to maintain restrictions on speech, and the best way to maintain restrictions is to chill speech by vigorously enforcing the Canons. Speaking about nothing save "the man in the moon and the weatherman,"[8] and giving the voters nothing but "name, rank and serial number"[9] reduces a judicial election to a popularity contest, one in which the challenger is at a serious disadvantage and cannot hope to win. Unable to overcome incumbent's name recognition and high-profile, or his ability to "announce" his or her views on disputed subjects through rulings, opinions and pronouncements in public court proceedings, challengers can be easily dissuaded.

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8. *Florida Supreme Court Commission on Standards of Conduct Governing Judges*, Opinion 78-13.

9. *J.C.J.D.*, 803 S.W. 2d at 956.

There are thus powerful institutional motivations to strictly control the flow of speech during judicial elections. State control of judicial speech through elected judges is pregnant with the possibility, if not the actuality, that these Canon's will be used not to protect the integrity of the judiciary but to protect the status quo. This issue, then , is in particular need of this Court's intervention and guidance because definitively foreclosing this possibility is essential.

In short, because of the systemic reasons why this important First Amendment issue may not come to this Court, this Court should thus take this opportunity to clarify the rights of voters and candidates in judicial elections, and provide needed guidance to the courts below.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — DECISION OF THE SUPREME COURT OF KENTUCKY DATED MARCH 24, 1994

Jed K. DETERS, Appellant,

v.

JUDICIAL RETIREMENT AND REMOVAL COMMISSION,

Appellee.

No. 93-SC-076-RR.

Supreme Court of Kentucky.

March 24, 1994.

* * *

Thomas Wesley Bosse, Deters, Benzinger & Lavelle, P.S.C., Covington, for appellant.

Jeffrey A. Darling, Lyon, Golibersuch & Darling, P.S.C., James D. Lawson, Executive Secretary, Judicial Retirement and Removal Com'n, Lexington, for appellee.

SPAIN, Justice.

Appellant was found by the Judicial Retirement and Removal Commission (Commission) to have twice violated Supreme Court Rule 4.020(1)(b)(v) and Canon 7 B(l)(c) of The Code of Judicial Conduct, Rule 4.300, on November 3 and 4, 1991, while he was a candidate for election as district judge, for which he was publicly censured. He appeals as a matter of right. We affirm.

Appendix A

It was stipulated before the Commission that on the above dates, campaign officials for Mr. Deters, with his knowledge and approval, caused political advertisements to be run in *The Messenger,* a Catholic newspaper, and in *The Kentucky Post,* a newspaper of general circulation in Northern Kentucky, which contained in bold print the statement: "Jed Deters is a Pro-Life Candidate." Mr. Deters was one of seven candidates in the November 5, 1991, special election for the remainder of an unexpired term for a judgeship in the 16th Judicial District, comprising Kenton County.

In the same campaign, Mr. Deters had earlier appeared before the Commission on October 11, 1991, to participate in an informal conference concerning a complaint that he had distributed other campaign materials in which he identified himself to be a member of a particular political party, in violation of Canon 7 A(2) of The Code of Judicial Conduct. Following that conference, Mr. Deters agreed to accept a public reprimand without formal proof, and on October 25, 1991, the Commission issued an Order of Public Censure against him.

The subsequent charges regarding the newspaper advertisements were the result of a complaint filed on November 11,1991, after Mr. Deters lost the district judge's race on November 5. Following the filing of formal charges and Mr. Deters' filing of an Answer in July 1992, the Commission held a full hearing on September 23,1992, at which he appeared with counsel, testified, and offered other evidence.

Canon 7 B(1)(c) states that a candidate for a judicial office:

> should not make pledges or promises of conduct in office other than the faithful and

> impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent his identity, qualifications, present position, or other facts.

The Commission entered its Findings of Fact, Conclusions of Law and Final Order of public censure of Mr. Deters on February 1, 1993. It concluded that, based upon clear and convincing evidence, it was proved that Mr. Deters:

> publicly announced his view on the abortion issue for the admitted purpose of obtaining support from voters interested in that issue. In doing so, he attempted to obtain an unwarranted and illegal advantage in the election over his opponents. In so acting, he violated Canon 7 B(1)(c) by making statements that commit or appear to commit the candidate to a position with respect to cases, controversies or issues that are likely to come before the court.

On this appeal, Mr. Deters raises four issues; first, that the Commission was without jurisdiction to sanction him; second, that the abortion issue was not likely to come before the Kenton County District Court; third, that he had a constitutionally protected right to discuss abortion in the public forum; and last, that the State has no compelling interest in prohibiting "all forms of a candidate's speech."

Appendix A

I.

Although Mr. Deters concedes that the Commission had jurisdiction over his conduct during the period of his candidacy for judicial office, he argues that once his candidacy terminated (by his defeat), so did the jurisdiction of the Commission over him. He cites the language of SCR 4.020 that:

> (1) Commission shall have authority
>
> > (b) to impose the sanctions [of admonition, private reprimand, public reprimand or censure] upon any judge . . . or lawyer *while* a candidate for judicial office . . . (emphasis added).

In addition, he cites SCR 4.000:

> This Part IV of these rules applies to all proceedings before the Judicial Retirement and Removal Commission involving the discipline, retirement or removal of . . . [Judges] . . . , as well as the disciplining of lawyers seeking judicial office *who during their candidacy* shall be deemed subject to the jurisdiction and discipline of the Commission. (Emphasis added.)

While it is true that these sections of the rule focus on the period of time during which the lawyer is actually a candidate, this is clearly for the purpose of defining the time during which the proscribed conduct falls under the commission's purview. Nothing therein attempts to limit the jurisdiction of the Commission

thereafter to deal with such conduct. The present case dramatically illustrates the reason for this to be so. Mr. Deters' questionable advertisements were published two days and one day before the election. Could it be seriously contended that the Commission, in order to act legally, had to investigate, give notice of charges, allow time for response, hold a hearing, make findings, and impose any sanctions against Mr. Deters, all within twenty-four to forty-eight hours?

In further support of this argument, appellant cites *Kentucky Bar Association v. Hardesty, Ky.*, 775 S.W.2d 87 (1989), in which he says:

> this Court explicitly divested the Commission of all power to sanction attorneys, holding that the Commission's exercise of these powers over attorneys was unconstitutional under *Kentucky Constitution* Section 121. In accordance with the *Hardesty* decision, Rule 4.050 was rewritten to require the Commission to refer disciplinary matters concerning attorneys over to the Bar Association.

Appellant's reading of *Hardesty is* far too broad. Its holding was simply that the former SCR 4.020(1)(b) erroneously gave to the Commission jurisdiction to impose sanctions relating to an *individual's right to practice law;* i.e., by providing for suspension or disbarment from the practice. Only those sanctions were held to require action by the Kentucky Bar Association as being beyond the scope of the Commission under Section 121 of the Constitution, and only those sanctions are now required by the rewritten SCR 4.020(1)(d) to be referred to the KBA as to *judge or lawyer.* In the present case, the only sanction levied by the

Appendix A

Commission against Mr. Deters was a public censure, and such is clearly within the Commission's authority.

II.

Mr. Deters next argues that his advertisements did not violate Canon 7 B(1)(c), as the abortion issue or controversy is not one "likely to come before the court." He specifically points to the fact that there have been no abortion-related cases that have come before the Kenton County District Court for over a decade, that the only two hospitals in the county are Catholic and do not perform abortions, and that there are no licensed abortion clinics in the county. He concedes that a physician could possibly perform an abortion in a private office, but opines that this is unlikely in view of the lack of hospital backup. Finally, he points to "the strong Catholic heritage of the populace, and the easy availability of abortion services less than fifteen minutes away, in Cincinnati" as to rendering "virtually nil" the chances of an abortion clinic opening in Kenton County.

The Commission nevertheless found that the issue of abortion was one that will likely come before the Kenton District Court. It cites KRS 311.732, which authorizes a minor to petition a district court for an order permitting an abortion. It also refers to the possibility of misdemeanor cases which could come before the district court involving abortion protests, including trespass, disorderly conduct, or assault. Furthermore, the Commission notes that district judges are often asked to serve as special judges in other counties where numerous abortion-related issues are pending before the court.

Although not specifically mentioned in the Commission's Order, the transcript of evidence of the hearing of September

23,1992, also reflects that two Commission members observed that the "pro-life" movement is not limited to abortions but also deals with living wills and controversies involving removing tubes or respirators, which are "big issue(s) right now, something that might come before a Judge."

We agree with the Commission's finding that Mr. Deters' political advertisements were a public announcement of his views on the abortion issue and we are further of the opinion that his claim of being "a pro-life candidate" appeared to commit him to a position not only on abortion matters, but also on other controversies, and that any or all of such issues and controversies are likely to come before the court. Moreover, there can be no doubt of Mr. Deters' motivation, as he freely testified that "any good Catholic is pro-life," that Kenton County has a high percentage of Catholic voters, and that his statement of being a "pro-life candidate" would "hopefully" give him "a distinct edge in a race," since "you're in it to win. You do what it takes."

III and IV

The appellant's third and fourth issues are, in effect, both challenges to the constitutionality of Canon 7 B(1)(c), of The Code of Judicial Conduct, and consequently, they will be discussed together. It is contended, first, that Mr. Deters had a constitutionally protected right to discuss abortion in the public forum, and second, that the state has no compelling interest in so restricting his right of free speech.

Numerous cases are cited from the U.S. Supreme Court and other courts for their holdings that the election process enjoys the strongest possible protection under the First Amendment of the U.S. Constitution because it is during elections that freedom of

speech is most urgently needed. It is said that if the electorate is to make informed decisions, then the information for that decision-making must be freely available. *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). Thus, the state must not interfere with a candidate's rights to "engage in the discussion of public issues and vigorously and tirelessly advocate for his own election . . . and make his views known so that the electorate may intelligently evaluate the candidates' personal qualities and their views on vital public issues before choosing them on election day." *Buckley v. Valeo,* 424 U.S. 1, 52-53, 96 S.Ct. 612, 651, 46 L.Ed.2d 659 (1976); *Brown v. Hartlage,* 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).

It is emphasized by appellant that such First Amendment jurisprudence also extends these strong protections to judicial elections, citing this Court's decision in *J.C.J.D. v. R.J.C.R.,* Ky., 803 S.W.2d 953 (1991). As a matter of fact it was the decision of the seven special justices sitting in that case which struck down Canon 7 B(1) of The Code of Judicial Conduct as it then existed, giving rise to the promulgation of the new canon which is now under attack in the instant case. The former language condemned by the decision prohibited a candidate for judicial office from announcing his views on all "disputed legal or political issues," whereas the present canon only prohibits "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. . . ."

The appellant also cites the recent decision of the U.S. Court of Appeals for the Seventh Circuit in *Buckley v. Illinois Judicial Inquiry Board,* 997 F.2d 224 (1993), wherein that court considered the same language as was contained in the former canon struck down by this Court in *J.C.J.D. v. R.J.C.R., supra.* The Seventh

Circuit also found the Illinois canon unconstitutionally overbroad. We do not agree with the appellant, however, in his assertion that *Buckley* holds that the provision contained in our present canon referring to "cases, controversies or issues likely to come before the court" is also unconstitutionally overbroad. Rather, we understand the decision to hold that the Federal District Judge whose decision was appealed had erroneously upheld the canon by "rewriting" it so as to make it narrower, using the "likely" test. The Court's additional comment concerning the "likely" test appears to be merely dictum.

The language of our present Canon 7 B(1)(c) has, however, been specifically upheld by a Federal Court as having been "sufficiently and closely drawn so as to avoid unnecessary abridgement of a judicial candidate's right of free speech during the campaign." *Ackerson v. Kentucky Jud. Ret. & Removal Com'n,* 776 F.Supp. 309 (W.D.Ky. 1991). The opinion recognized that, while candidates for elective judicial office are not without the protection of the First Amendment, their campaign conduct has nevertheless been regulated to a greater degree than nonjudicial candidates. As stated by the U.S. Court of Appeals for the Fifth Circuit in *Morial v. Judiciary Comm'n,* 565 F.2d 295, 305 (5th Cir.1977):

> Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind. For example the contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most nonjudicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach

> a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office. He cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result.

The district court in *Ackerson, supra,* further found that the language with respect to issues which are "likely to come before the court" is not impermissibly vague, stating at page 315:

> The canon does not prohibit all speech by a judicial candidate on legal issues. A candidate may fully discuss, debate, and commit himself with respect to legal issues which are unlikely to come before the court. A candidate may also fully discuss and debate legal issues which are likely to come before the court. It is only with respect to the latter that the candidate is prohibited from making direct or indirect commitments.

Finally, the *Ackerson* opinion holds, as do we, that there is a compelling state interest in so limiting a judicial candidate's speech, because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system.

All of us undoubtedly accumulate some preferences, opinions, biases, and prejudices as we live through our individual

life experiences. It is the task of a judge, nevertheless, to make a conscious effort to be as objective as humanly possible in answering the call to be fair and impartial. Justice can hardly be blind if the judge has made a pre-election commitment or prejudgment which causes him or her to apply the blindfold only as to one side of an issue.

The Findings of Fact, Conclusions of Law and Final Order of the Judicial Retirement and Removal Commission publicly censuring Hon. Jed K. Deters is affirmed.

STEPHENS, C.J., and LEIBSON, REYNOLDS and STUMBO, JJ., concur.

WINTERSHEIMER, J., concurs in part and dissents in part by separate opinion in which LAMBERT, J., joins.

WINTERSHEIMER, Justice, concurring in part and dissenting in part.

I concur with that part of the opinion which determines that the Judicial Retirement and Removal Commission has jurisdiction to sanction a defeated judicial candidate after the election. However, I believe that the facts of this case present a serious constitutional question which has been improperly decided.

Deters was one of seven candidates for the office of district judge of Kenton County in the November, 1991 election. He finished fifth. Two newspaper advertisements were placed stating that "Jed K. Deters is a Pro-Life Candidate." One ad was placed in the Catholic Messenger, a weekly newspaper, and the other in the Kentucky Post, a daily newspaper of general circulation in Northern Kentucky.

Appendix A

Zeal for the cause of judicial integrity is understandable and commendable. However, there must always be a careful balance between, the need for impartiality of judges and the right of political free speech in response to an inquiry by the electorate. The right to disseminate information must be considered in regard to all the likely circumstances in a practical setting. The right of the public to know and the right to inform in regard to the question of elections are part of this complex mixture of political free speech.

Political free speech is primary as the cornerstone of a responsible representative democracy because it relates directly to the function of government in a free society. An informed electorate is the foundation of true liberty. The judiciary is no exception and is subject only to limitations which must be carefully and narrowly drawn. Recusal is a full guarantee for any appearance of impropriety. The requirement of the appearance of impartiality can easily be satisfied by recusal, voluntary or involuntary, of the judge thought to be offending. The best antidote for the misbehaving candidate is the voice of a truly informed electorate.

Practically, there is little likelihood that the issue involved in this case will occur. The advertisements in question were not a violation of the Judicial Canons of Ethics because the abortion issue is not likely to come before the Kenton District Court.

The record indicates there was no factual evidence presented by the commission on this question and that the candidate was obliged to present all the facts. The evidence as stipulated before the commission indicated that the sitting district judges in Kenton County were willing to testify that they had never heard an abortion related issue, that none were pending and that they did not anticipate any arising in the future. There are no hospitals in

Kenton County which perform abortions, and there are no licensed abortion clinics in the county.

The ethical rule in question is more narrow than the issue denounced by this Court in *J.C.J.D. v. R.J.C.R.*, Ky., 803 S.W.2d 953 (1991). There is a distinct difference between the standard of "likely" to come before the court and the criteria of "could possibly" come before the court. An abortion related issue is not likely to come before the Kenton County District Court.

A larger issue is the right of a candidate to discuss a public issue in the public forum, including a newspaper advertisement. There is a fundamental right of the people to know any candidate's views and to obtain the information that is relevant to them in making their final electoral choices. Any restriction on a candidate's right to engage in legitimate political discussion restricts the electoral process by not allowing the voters to obtain the necessary information.

Two principles are in conflict and must to the extent possible be reconciled. Candidates for public office should be free to express their views on all matters of interest to the voters. Judges, as candidates for public office, are in that category. However, judges in the performance of their duty must decide cases before them in accordance with the law rather than with any implied promises that may have been made to campaign supporters or to others. *See Buckley v. Illinois Judicial Inquiry Board,* 997 F.2d 224 (7th Cir. 1993).

The need and right of the voter to have information should be unchallenged and should be paramount in this consideration. *Cf. Monitor Patriot Co. v. Roy,* 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971). This Court, in *J.C.J.D., supra,* indicated that a broad

rule prohibiting judicial candidates from speaking on disputed issues serves only to turn the judicial election into a popularity contest. The U.S. Supreme Court has repeatedly endorsed protection for the electoral process and the necessary first amendment rights related thereto. *Cf. Brown v. Hartlage,* 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).

There could be a variety of issues that may be important to the voters in a particular election. The response of candidates for judicial office can easily reveal their general view and philosophy as a public officeholder. In responding to such general and specific questions through a paid newspaper advertisement, a candidate should be considered as disseminating information so requested. The activity of response and information should be protected.

In regard to the right of political free speech, any state regulation must be subject to strict scrutiny and will be struck down unless it serves a compelling state interest and is narrowly drawn to serve that compelling state interest. *Brown v. Hartlage, supra.* When a regulation of free speech can result in disciplinary action against the speaker, the regulation will be subject to even greater scrutiny. *In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). The canon challenged here cannot meet such a test of compelling interest and strict scrutiny.

The rationalization for Canon 7 B(1) is that it protects the integrity and impartiality of the judiciary. Impartiality of the judiciary is safeguarded by the fact that SCR 4.300 Canon 3(C) requires a judge to recuse when any personal viewpoint obstructs the ability to render a fair and impartial decision.

This Court in *J.C.J.D. v. R.J.C.R., supra* held that a very similar rule violated the First Amendment right of free speech.

Appendix A

There are other decisions on analogous issues which reach a similar conclusion. *See Buckley v. Illinois Judicial Inquiry Bd., supra. J.C.J.D.* held that freedom of speech extends to all candidates for public office, including judicial candidates, and that where state regulations extend so far as to completely outlaw speech because of subject matter, there is a strong presumption of unconstitutionality.

The principle of impartial justice under law is strong enough to entitle the government to restrict the freedom of speech of those participating in the judicial process or election, but it is not so strong as to place that process completely above the scope of the constitutional guaranty of free speech. *Buckley.* The cardinal principle in balancing the tension between free speech and judicial propriety must remain that state laws which restrict free speech and that can result in disciplinary action against the speaker are subject to very strict scrutiny. The question must be whether the regulation has been so narrowly designed and strictly applied that a compelling state interest is served without unnecessarily burdening the exercise of free speech.

In my view that strict standard has not been met in this case.

LAMBERT, J., concurs in this opinion.

APPENDIX B — FINAL ORDER DATED FEBRUARY 1, 1993

COMMONWEALTH OF KENTUCKY
JUDICIAL RETIREMENT AND REMOVAL COMMISSION

IN RE THE MATTER OF:

HON. JED R. DETERS

* * * * *

FINDINGS OF FACT CONCLUSIONS OF LAW
AND FINAL ORDER

I

STATEMENT OF CHARGES

The Judicial Retirement and Removal Commission of the Commonwealth of Kentucky was created for the purpose of, and is vested with the jurisdiction to, initiate, hear and decide charges of official misconduct by any judge of the Court of Justice or lawyer while a candidate for judicial office, and upon a finding of such official misconduct, to impose sanctions pursuant to SCR 4.020.

The Commission instituted proceedings against judicial candidate Jed R. Deters on July 2, 1992, under Supreme Court Rule 4.180. The following charges were filed:

Count I – Mr. Deters, a candidate for election as district judge of the Sixteenth Judicial District, violated Rule 4.020 (1) (b) (v) of the Rules of the Supreme Court and Canon 7B(l)c by placing a political advertisement in *The Messenger,* a Catholic newspaper, on or about November 3, 1991 which contained in bold print, "Jed Deters is a Pro-Life Candidate."

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Count II – Mr. Deters, a candidate for election as district judge of the Sixteenth Judicial District, violated Rule 4.020 (1) (b) (v) of the Rules of the Supreme Court and Canon 7B(l)c by placing a political advertisement in *The Kentucky Post, a newspaper of general circulation,* on or about November 4, 1991 which contained, in bold print, "Jed Deters is a Pro-Life Candidate."

II.

PROCEEDINGS

1. The respondent, Hon. Jed R. Deters, was a candidate for district judge of the Sixteenth Judicial District of the Commonwealth of Kentucky, Kenton County, in the general election held in November, 1991.

2. On October 11, 1991, Mr. Deters appeared before the Commission for an informal conference pursuant to SCR 4.170(2) concerning a complaint that he had distributed campaign materials in which he identified himself to be a member of a political party in violation of Canon 7A(2) of the Code of Judicial Conduct. Following the informal discussion, Mr. Deters agreed to accept a public reprimand without formal proof. On October 25, 1991, the Commission issued an "Order of Public Censure" against Mr. Deters for violating Canon 7A(2).

3. The formal charges against Mr. Deters resulted from a complaint filed with the Commission dated November 11, 1991.

4. By letter dated February 27, 1992, the Commission gave Mr. Deters the factual information in the custody of the Commission for his examination and afforded him an opportunity to present any other information bearing on the investigation. Mr.

Deters, through his counsel, submitted a response dated March 20, 1992 for the Commission's consideration.

5. The Commission initiated formal charges against Mr. Deters by mailing to him and his counsel Formal Proceedings and Charges dated July 2, 1992. Counsel for Mr. Deters replied to the charges by Answer dated July 16, 1992.

6. Mr. Deters was provided a Notice of Hearing dated September 3, 1992 and was accorded a full hearing on September 23, 1992, at which he appeared with counsel, testified in his own behalf and offered other evidence.

III

FINDINGS OF FACT

The Judicial Retirement and Removal Commission unanimously concludes that the following Findings of Fact have been established by clear and convincing evidence:

The basic facts in this case were stipulated by the parties and are not in dispute. On November 3 and 4, 1991, campaign officials for Mr. Deters, with his knowledge and approval, caused two political advertisements to be run in newspapers of general circulation which in part stated, "Jed Deters is a Pro-Life Candidate".

Appendix B

IV

CONCLUSIONS OF LAW

COUNTS I & II

On the basis of the evidence, the Commission, by unanimous vote, concludes that the charges in Counts I and II have been proved by clear and convincing evidence.

The Commission concludes that Mr. Deters publicly announced his view on the abortion issue for the admitted purpose of obtaining support from voters interested in that issue. In doing so he attempted to obtain an unwarranted and illegal advantage in the election over his opponents. In so acting, he violated Canon 7B(c) by making statements that commit or appear to commit the candidate to a position with respect to cases, controversies or issues that are likely to come before the court.

In his defense, Mr. Deters argues that Section 121 of the Kentucky Constitution limits the general jurisdiction of the Commission to judges and that any jurisdiction that the Commission had over him under the Rules of the Supreme Court ended with his defeat in the election on November 5, 1931. The Commission disagrees. The Commission believes that the Kentucky Supreme Court, in amending its rules in 1983 to include jurisdiction of the Commission over lawyers seeking judicial office, did not intend the jurisdiction to end if the lawyer candidate lost the election. The purpose of the amendment was to bring all candidates for judicial office under the Commission's jurisdiction and to allow the Commission to investigate, hold formal hearings, make findings and impose appropriate sanctions on all candidates for judicial office including lawyers seeking judicial office.

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Mr. Deters argues that he did not violate Canon 7B(1)c because abortion is not an issue likely to come before Kenton District Court. He contends that there have been no recent abortion-related cases in Kenton District Court, that there are no abortion clinics in Kenton County and that the two hospitals in Kenton County do not perform abortions. The Commission disagrees since the abortion issue may come before the district courts from several avenues. Under KRS 311.732, a minor may petition the district court to obtain an order of the court allowing the abortion to take place. The issue may also come before the district court in misdemeanor cases involving abortion protests including trespass, disorderly conduct or assault. Also, district judges are often asked to serve as special judges in other counties where numerous abortion-related issues are pending before the court. The Commission believes that the abortion issue is one that will likely come before the Kenton District court. As a result the public has a right to expect that the court will assess the facts of a case and apply the law regardless of the personal views of the judge. By declaring his position on the abortion issue in his campaign ads, Mr. Deters has no doubt left the public with the impression that he has prejudged the issue and cannot be a fair and impartial judge concerning this issue.

Finally, Mr. Deters argues that he had a constitutionally-protected right to discuss abortion during his campaign for district judge. The Commission does not have authority to rule on the constitutionality of the Rules governing the functions of the Commission. While the Commission believes that the constitutional issue raised by Mr. Deters is an issue for the Supreme Court and not the Retirement and Removal Commission, it should be noted that the members of the Commission unanimously believe that Canon 7B(1)c, on its face and as applied to the facts in this case, is constitutional.

Appendix B

ORDER

The Judicial Retirement and Removal Commission, by unanimous vote, finds and it is hereby ORDERED AND ADJUDGED that for the foregoing violation, Jed K. Deters should be and hereby is Publicly Censured.

Rule 4.270 provides that the Commission's order shall become effective and made public within ten days after service unless an appeal is filed within that time.

I hereby certify that the above Findings of Fact, Conclusions of Law and Final Order of Public Censure represents a unanimous action of the Judicial Retirement and Removal Commission this 1st day of February, 1993.

s/ Joe C. Savage
JOE C. SAVAGE, CHAIRMAN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Findings of Fact, Conclusions of Law and Final Order has been served on Hon. Jed Deters by mailing a copy first class U.S. postage to Hon. Thomas Bosse, Thomas More Park, 2701 Turkeyfoot Road, Covington, Kentucky 41017, attorney for Mr. Deters and to Hon. Jeff Darling, 171 North Upper Street, Lexington, Kentucky 40507, attorney for the Commission, this 1st day of February, 1993.

s/ James D. Lawson
JAMES D. LAWSON
EXECUTIVE SECRETARY

APPENDIX C — RELEVANT CONSTITUTIONAL AMENDMENTS AND RULES

United States Constitution:

AMENDMENT I

Freedom of religion, speech and press; rights of assembly and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. Citizenship; Due process; Equal protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix C

Kentucky Supreme Court Rules:

RULE 4.020 JURISDICTION
[Of the Judicial Retirement & Removal Commission]

(1) Commission shall have authority:

(a) To order a temporary or permanent retirement of any judge whom it finds to be suffering from a mental or physical disability that seriously interferes with the performance of his duties, and to suspend temporarily from the performance of his duties, without affecting his pay status, any judge (i) against whom there is pending in any court of the United States an indictment or information charging him with a crime punishable as a felony, or (ii) after notice and an opportunity to be heard, and upon a finding that it will be in the best interest of justice that he be suspended from acting in his official capacity as a judge until final adjudication of the complaint, any judge against whom formal proceedings have been initiated under Rule 4.180.

(b) To impose the sanctions separately or collectively of (1) admonition, private reprimand, public reprimand or censure; (2) suspension without pay or removal or retirement from judicial office, upon any judge of the Court of Justice or lawyer while a candidate for judicial office, who after notice and hearing the Commission finds guilty of any one or more of the following:

(i) Misconduct in office.

(ii) Persistent failure to perform his duties.

(iii) Incompetence.

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(iv) Habitual intemperance.

(v) Violation of The Code of Judicial Conduct, Rule 4.300.

(vi) Any willful refusal or persistent failure to conform to official policies and directives adopted by the Supreme Court and issued by the Chief Justice in his constitutional capacity as Chief Executive Officer of the Court of Justice.

(vii) Conviction of a crime punishable as a felony.

(c) After notice and hearing, to remove a judge whom it finds to lack the constitutional and statutory qualifications for the judgeship in question.

(d) To refer any judge of the Court of Justice or lawyer while a candidate for judicial office, after notice and hearing found by the Commission to be guilty of misconduct, to the Kentucky Bar Association for possible suspension or disbarment from the practice of law.

(2) Any erroneous decision made in good faith shall not be subject to the jurisdiction of the Commission.

[Adopted effective October 1, 1976; amended effective January 1, 1978; September 1, 1980; March 8, 1983; August 28, 1989.]

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RULE 4.300 CODE OF JUDICIAL CONDUCT

CANON 1.
A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2.
A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

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CANON 3.
A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

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(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) A judge or court may prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas *immediately adjacent thereto during sessions of court or recesses* between sessions. Subject, however, to the continuing authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state may be allowed by the individual court, or may be directed by the Supreme Court, in accordance with the standards of conduct and technology set forth in the appendix appearing at the end of this Rule 4.

B. Administrative Responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third

degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification. A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

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CANON 4.
A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

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CANON 5.
A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any cour

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor of an organization's fund raising events, but he may attend such events.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees

even though it has the responsibility for approving investment decisions.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him.

(5) For the purpose of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person

with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

This Canon (5D. Fiduciary Activities) shall not prohibit a judge from continuing to perform fiduciary duties under an appointment accepted prior to January 1, 1978, the date on which the Canons were adopted as a part of these Rules.

E. Arbitration. A judge should not act as an arbitrator or mediator.

F. Practice of Law. A judge should not practice law.

G. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

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CANON 6.
A JUDGE MAY RECEIVE COMPENSATION FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

CANON 7.
A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO HIS JUDICIAL OFFICE

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office; however, a judge may privately endorse any candidate of his choice;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings and speak to such gatherings on his own behalf when he is a candidate for election or reelection. A judge or candidate for nomination or election to judicial office may not identify himself as a member of a political party in any form of advertising, or when speaking to a gathering on his own behalf. If not initiated by the judge or candidate for such office, and only in answer to a direct question, he may identify himself as a member of a particular political party. For purposes of this canon a judge holding such office will be deemed to be a candidate for reelection during his entire term of office.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

(5) No member of the judiciary shall engage in any activity in the nature of lobbying with the executive or legislative branch of the state government on matters affecting the judiciary without express authority from the Chief Justice.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c)* should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent his identity, qualifications, present position, or other facts.

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* Pub. Note: See *Ackerson v. Kentucky Judicial Retirement and Removal Commission*, 776 F.Supp. 309 (W.D.Ky.1991), regarding the constitutionality of this provision.

(2) A candidate, including an incumbent, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than 120 days before a primary election and no later than 120 days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

[Amended effective April 4, 1991.]

COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-Time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto. This provision shall not, however, prevent a trial commissioner of the District Court or a commissioner of the Circuit Court from practicing in the court of which he is a commissioner so long as he has not taken and does not take any action as such commissioner with respect to the matter or matters in which he practices as an attorney.

B. Judge Pro Tempore. A judge pro tempore is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge pro tempore is not required to comply with Canon 5C(2), (3), D, E, F, and G.

(2) A person who has been a judge pro tempore should not act as lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

[Adopted effective January 1, 1978; amended effective February 1, 1978; March 1, 1978; June 1, 1978; January 29, 1979; July 1, 1979; January 1, 1980; July 1, 1981; October 1, 1982; January 1, 1987.]

(2)

Supreme Court, U.S.
FILED
AUG 12 1994
THE CLERK

No. 94-111

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JED K. DETERS - - - - - - - Petitioner

versus

JUDICIAL RETIREMENT AND REMOVAL COMMISSION OF THE COMMONWEALTH OF KENTUCKY - Respondent

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JEFFREY A. DARLING
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August 12, 1994

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a Canon imposed by a State Supreme Court, which prohibits a candidate for judicial office from making statements which appear to commit the candidate with respect to issues likely to come before the court, infringes on the candidate's First Amendment rights.

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Stretton v. *Disciplinary Board of the Supreme Court of Pennsylvania*, 994 F.2d 137 (3rd Cir. 1991) 6, 7

United States Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) 6

Rules Cited:

SCR 4.020(1)(b)(v) 2

SCR 4.300, Canon 7B(1)(c) 2, 3, 6, 7, 8

No. 94-111

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JED K. DETERS - - - - - - - - - *Petitioner*

v.

JUDICIAL RETIREMENT AND REMOVAL COMMISSION OF THE COMMONWEALTH OF KENTUCKY - - - - - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, Judicial Retirement and Removal Commission of the Commonwealth of Kentucky (Commission), agrees that the facts of this case are relatively straightforward and not in dispute.

However, the Commission would like to distill the facts to those relevant to the Court's decision. The parties stipulated that the Petitioner, Jed K. Deters (Deters), was a candidate for election to the District Judgeship to the Sixteenth Judicial District of the Commonwealth of Kentucky, Kenton County, in November, 1991. Deters was unsuccessful in that campaign and at the time his matter came before the Commission, he was not a judicial officer or candidate for any judgeship.

The violations before the Commission were that on November 3, 1991, Deters' campaign treasurer caused a political advertisement to be run in the *Messenger* stating that Deters was "pro-life" candidate. The advertisement ran with the knowledge and approval of Deters.

The other violation was that on November 4, 1991, the campaign treasurer caused to be run in the *Kentucky Post* another advertisement which also stated that Deters was a "pro-life" candidate. This advertisement likewise ran with the knowledge and approval of Deters.

The Commission alleged that these proclamations of Mr. Deters' political views violated 4.020(1)(b)(v) and 4.3 of the Rules of the Kentucky Supreme Court.[1]

Deters stated at a formal hearing in this matter, held on September 23, 1992, that his advertisements referred to him as a "pro-life" candidate because "that was something that the public was concerned about." (R.4, Tr. p. 9). Deters further testified that he felt these advertisements

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[1]SCR 4.020(1)(b)(v) confers jurisdiction upon the Commission to impose sanctions for violation of the Code of Judicial Conduct, which is embodied in SCR 4.300. This Rule sets out the Canons, including Canon 7B(1)(c), which is challenged in this Petition. That provision of the Canon reads as follows:

> B. Campaign Conduct
>
> (1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:
>
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent his identify, qualifications, present position, or other facts.

did not violate the Canons because he made a decision that issues involving pro-life or pro-choice were not likely to come before him as a district judge. (Id., Tr. pp. 10-11).

Deters admitted in his testimony he did not feel his position on abortion had any relevance to his candidacy for district judge, but he made it a theme in his advertisements because people wanted to know and because the "general public" did not realize it had nothing to do with his candidacy. It was also brought out that the county of jurisdiction, Kenton, had a high percentage of Catholic voters and that the particular issue of abortion would be something that would be significant to these Catholic voters. (Id., Tr. pp. 19-20, 23, 21).

After the formal hearing and submission of briefs, the Commission, by final order dated February 1, 1993, ordered that Deters be Publicly Censured. The Commission addressed findings of facts and procedural issues and deferred the question of Deters' First Amendment rights to the Kentucky Supreme Court, however noting that the members of the Commission unanimously believed that Canon 7B(1)(c), on its face and applied to the facts in this case, is constitutional. (*See* Petitioner's Appendix B, p.20a).

Petitioner Deters appealed the Commission's decision to the Kentucky Supreme Court, which in a 5-2 decision affirmed the Commission's ruling in every respect, including the First Amendment argument which is before this Court.

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari should be denied. Petitioner has not shown that the Kentucky Supreme Court has decided a federal question in a way that conflicts with a decision of another state court of last resort or a United States Court of Appeals, nor has he shown that the Kentucky Supreme Court has decided an important question of federal law which either conflicts with applicable decisions of this Court or should be settled by this Court, as required by Rule 10.1.

The Commonwealth of Kentucky should be allowed to govern the conduct of its judges and candidates for judicial office. A sufficient federal question has not been shown which would warrant intervention by the highest federal court in the land.

ARGUMENT

I. The Kentucky Supreme Court is Not in Conflict With United States Supreme Court's Decisions in This Area.

Contrary to Petitioners' argument in this regard, the Kentucky Supreme Court's decision, *Deters* v. *Judicial Retirement and Removal Commission*, Ky., 873 S.W.2d 200 (1994), is not in conflict with any of the cases he cited. Each case, from which Petitioner exacts one small statement or quote, is clearly distinguishable on its face. *Simon & Schuster, Inc.* v. *Members of the New York Crime Victims Board*, 502 U.S. ___, 112 S.Ct. 501 (1992), is the case where this Court struck down "Son-of-Sam" law enacted by the state of New York. This Court found that there was no state interest in limiting a victim's compensation to the proceeds of a convicted criminal's speech (in the form of books, etc.) about the crimes where the victims were injured. In that case, the statute was clearly designed to limit speech rather than to facilitate the compensation of

victims, and therefore unconstitutional. This case clearly has little relevance to the case at bar.

Petitioner also cites *Mills* v. *Alabama*, 384 U.S. 214 (1966), a case where this Court struck down a statute which prohibits soliciting votes on an election day. This case was a significant First Amendment decision because it involved a newspaper being charged with a crime for printing an editorial in favor of a referendum on the day of the election. Again, nothing in this decision affected speech allowed or disallowed by a candidate for any office, much less a judicial office.

Likewise, *Monitor Patriot Company* v. *Roy*, 401 U.S. 265 (1971), was a libel case against a newspaper and had nothing to do with prohibiting the speech of a candidate. Finally, Petitioner cites *Brown* v. *Hartlage*, 456 U.S. 45 (1982), which involved this Court's refusal to order a state to decertify the election of a candidate who offered to work for a lower salary than that allowed by statute. When the candidate found that this offer apparently violated a law against promising pecuniary gain to voters in return for their vote, he rescinded the offer. However, his unsuccessful opponent sued to have the election decertified because of the violation of the statute. An appellate court threw out the election, a decision reversed by this Court which held that the First Amendment would not allow misstatements of fact to give rise to absolute accountability. This Court held that this would be incompatible with the atmosphere of free discussion contemplated by the First Amendment. Again, this was not a judicial election, and this Court was deciding whether a far more substantial consequence, that being the decertification of an election and the disturbing of an electorate's valid decision, is appropriate when measured against freedom of speech. This case, like the others, is clearly distinguishable from ours.

II. Kentucky Has a Compelling Interest in Protecting The Integrity of The Judiciary, Best Served by Its Canon 7B(1)(C).

Petitioner, in his brief, repeatedly maintains that Canon 7B(1)(c) prohibits candidate speech. Obviously, this is not the case. The Canon only maintains that a candidate should not make statements that "commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." The Commission and the Kentucky Supreme Court have already made a finding of fact that cases related to the abortion issue are likely to come before the Kenton District Court, and that finding is not a subject of this Petition. The sole, narrow issue is, can a rule that prohibits a candidate from making statements that commit or appear to commit the candidate with respect to cases, controversies or issues likely to come before his court pass constitutional muster? Clearly, the First Amendment's protection is not absolute, and the answer is yes it can.

It is axiomatic, and even conceded in Petitioner's brief, that Kentucky has a compelling interest in protecting the integrity of the judiciary. *Morial* v. *Judiciary Commission of the State of Louisiana,* 565 F.2d 295 (5th Cir. 1977), citing *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973) and *Lubin* v. *Panish,* 415 U.S. 709 (1974); *Stretton* v. *Disciplinary Board of the Supreme Court of Pennsylvania,* 944 F.2d 137 (3rd Cir. 1991), citing *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

This Court, in *Cox,* stated that a "state may also properly protect the judicial process from being misjudged in the minds of the public." *Id.* at 565. That principle is particularly important in our case. As stated in the Commission's statement of facts, Petitioner Deters admitted in his testimony at the formal hearing that he did not

feel his position on abortion had any relevance to his candidacy for District Judge, but made it a theme in his advertisements because the "general public" did not realize it had nothing to do with his candidacy. Petitioner admitted that the only reason he proclaimed his "pro-life" stance was because he was in a heavily concentrated Catholic district which he hoped would give him a distinct edge in the race. He specifically stated, "I mean, you're—you're in it to win. You do what it takes." (R.4, Tr. p.30). Deters' behavior is perfectly illustrative of why a state would have a compelling interest in narrowly restricting some part of judicial candidates' behavior.

Simply put, this Court has already recognized a compelling state interest in upholding the impartiality and integrity of the judiciary. *Buckley* v. *Valeo,* 424 U.S. 1 (1976). Petitioner actually misstates the Court's holding in *Buckley,* which upheld most of the restrictions in the law challenged in that case, striking down only limits on campaign expenditures as being violative of First Amendment privileges.

III. This Issue is Not an Unsettled Question of Federal Law, And Therefore This Court's Intervention in a Ruling of The Kentucky Supreme Court Is Unnecessary.

Petitioner maintains that this Court should grant Certiorari on this issue because the Court has not yet applied its precedents to judicial elections. However, guidance has been granted in other federal courts, and these courts have consistently ruled in favor of Canons identical to or similar to the challenged 7B(1)(c). *Morial* v. *Judiciary Commission of the State of Louisiana,* supra; *Stretton* v. *Disciplinary Board of the Supreme Court of Pennsylvania,* supra; *Ackerson* v. *Kentucky Judicial Retirement and Removal Commission,* 776 F.Supp. 309 (W.D. Ky. 1991) (upholding the exact Canon challenged here).

Cases cited by the Petitioner to the contrary, *Buckley* v. *Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993) and *J.C.J.D.* v. *R.J.C.R.*, Ky., 803 S.W.2d 953 (1991), dealt with a different Canon with different language altogether. In fact, the Canon dealt with in both of those cases had identical language. In *J.C.J.D.*, the Kentucky Supreme Court struck down the Canon as unconstitutional, and the present Canon 7B(1)(c) is the response to that decision, addressing the Kentucky Supreme Court's concerns.

Petitioner requests that this Court provide guidance, yet guidance is unnecessary in view of the consistent plethora of cases from other courts already in existence. Petitioner has not cited any cases dealing with a Canon with similar language to 7B(1)(c) which has been held unconstitutional; therefore, there is no conflict in the courts and no need for guidance from this Court.

This matter is one where a person is running for state court judgeship and the matter has been reviewed by a state commission, and the commission's decision has been affirmed by the state's highest court. "Guidance" is unnecessary and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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